GWEN MOORE
4TH DISTRICT, WISCONSIN

COMMITTEE ON
FINANCIAL SERVICES
MONETARY POLICY AND TRADE, RANKING MEMBER
FINANCIAL INSTITUTIONS AND CONSUMER CREDIT
OVERSIGHT AND INVESTIGATION

DEMOCRATIC STEERING AND
POLICY COMMITTEE

CONGRESSIONAL BLACK CAUCUS WHIP

WASHINGTON OFFICE:
2252 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
(202) 225-4572

DISTRICT OFFICE:
316 N. MILWAUKEE ST, SUITE 406
MILWAUKEE, WI 53202
(414) 297-1140
FAX: (414) 297-1086

Congress of the United States

House of Representatives

December 14, 2018

931

The Honorable Ajit V. Pai
Chairman
455 12th Street, Southwest
Washington, DC 20544

Dear Chairman Pai:

I am writing today regarding the Federal Communications Commission's Second Further Notice of Proposed Rulemaking, "Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992" (MB Docket No. 05-311). I am concerned that this rulemaking may have the effect of eliminating Public, Educational and Government (PEG) channels from cable system line-ups. This is the opposite effect intended by the Cable Act passed by Congress.

Wisconsin PEG channels have been serving the needs of Wisconsin communities for information and coverage of their communities for decades. In passing the Cable Act, Congress intended that space be reserved on the line-up for the use of communities, so that there would be local programming on cable systems otherwise filled with commercial programming services that do not recognize or serve local needs.

The intent of the law is clear. By providing these channels to local franchising authorities who request them, "cable systems are being responsive to the needs and interests of the local community" and furthering the goal of providing "the widest possible diversity of information sources and services to the public" – two of the stated purposes of the Cable Act.[1] Cable operators are fulfilling a public interest by setting aside these channels for the use of communities and it was surely not the intent of the Cable Act to enable cable operators to sell this capacity to communities and make a profit.

Wisconsin has a state franchise law,[2] which sets the franchise terms for the entire state. Municipalities receive the number of PEG channels and origination points last negotiated with cable operators before the law took effect in 2008. In addition, there is a franchise fee, also at the percentage last negotiated by the locality with the cable operator. No other in-kind support is allowed. The PEG fee in Wisconsin sunsetted in 2011.

At the time, industry stakeholders had no problem with providing channel capacity, transmission, origination lines and the franchise fee as separate conditions for being allowed

[1] [47 USC 521(2) and 47 USC 521(4)]
[2] Wis. Stats. 66.0420

to operate. For more than thirty years, cable operators have routinely proposed renewal terms to municipalities that include a 5% franchise fee, a PEG fee to support the capital and frequently the operating needs of PEG stations, as well as additional in-kind support. Both parties come into these negotiations knowing they must make a deal with each other. There are no other cable operators waiting in the wings for municipalities to turn to if negotiations break down. Few cities have more than one cable operator and in Wisconsin, for example, Charter serves nearly the whole state. Operators have a significant investment in the communities they serve. Both cost and serving cable-related community needs frame the negotiations between these partners as they consider the operator's proposal.

Interpreting the term "franchise fee" to include in-kind services, as the FCC appears anxious to do, would undermine the intent of the Cable Act that is reflected in thousands of agreements across the country that have been negotiated by the parties in good faith. If the FCC changes the law, which it would certainly be doing, it will hit Wisconsin especially hard since our state's municipalities do not have an extra PEG fee to provide a secondary revenue stream for, as the Cable Act puts it, "capital costs which are required by the franchise to be incurred by the cable operator for public educational, or governmental access facilities."[3] (It should be noted that the Cable Act defines "public, educational, or governmental access facilities" as both channel capacity designated for public, educational or governmental use and facilities *and* equipment for the use of such channel capacity.[4])

Under the FCC's proposal, Wisconsin municipalities will have a hard choice to make between crucial municipal services and purchasing a PEG channel for the use of the community. This is a decision the Cable Act never contemplated.

I urge the commission to honor the purpose of the law and not seek to undermine it by endorsing a new meaning for the term "franchise fee." PEG channels serve an important role in providing local information about the government, schools, and community in which subscribers live. I sincerely hope the Commission recognizes the significant role these stations play and will uphold the law's mandate that "the cable operator will provide adequate public, educational, and governmental access channel capacity, facilities, or financial support."[5] To do otherwise will result in the closure of PEG access stations in Wisconsin and across the country. A rulemaking that implements the Cable Act should not undermine its goals.

Thank you for your attention to this issue.

Sincerely,

Gwen Moore
MEMBER OF CONGRESS

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[3] 47 USC 542(g)(2)(C)
[4] 47 USC 522(16)
[5] 47 USC 541(a)(4)(B)

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

January 2, 2019

The Honorable Gwen Moore
U.S. House of Representatives
2252 Rayburn House Office Building
Washington, D.C. 20515

Dear Congresswoman Moore:

Thank you for your letter regarding the impact that the statutory cap on franchise fees has on funding for public, educational, or governmental (PEG) channels. As you know, the Communications Act limits franchise fees to 5% of cable revenues and defines "franchise fee" to include "any tax, fee, or assessment of any kind imposed by a franchising authority or other governmental entity on a cable operator or cable subscriber, or both, solely because of their status as such." 47 U.S.C. § 542(g)(1). The U.S. Court of Appeals for the Sixth Circuit has held that the terms "tax" and "assessment" can include nonmonetary exactions. Montgomery County, Md. et al. v. FCC, 863 F.3d 485, 490-91 (6th Cir. 2017).

In response to a remand from the Sixth Circuit, the Commission unanimously issued its Second Further Notice of Proposed Rulemaking to consider the scope of the congressionally-mandated statutory limit on franchise fees. Among other things, the Commission observed that Congress broadly defined franchise fees; indeed, with respect to PEG channels, it only excluded support payments with respect to franchises granted prior to October 30, 1984 as well as capital costs required by franchises granted after that date. 47 U.S.C. § 542(g)(2)(B) & (C). The record of this proceeding remains open, and I encourage all interested parties and stakeholders—including local franchising authorities—to provide us with relevant evidence regarding these issues so that the Commission can make the appropriate judgment about the path forward, consistent with federal law. Your views will be entered into the record of the proceeding and considered as part of the Commission's review.

Please let me know if I can be of any further assistance.

Sincerely,

Ajit V. Pai

Ajit V. Pai